No. 14-770

In The

Supreme Court of the United States

BANK MARKAZI, aka THE CENTRAL BANK OF IRAN,

Petitioner,

v.

DEBORAH PETERSON, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AGUDAS CHASIDEI CHABAD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF OF AGUDAS CHASIDEI CHABAD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS[1]

Agudas Chasidei Chabad ("Chabad") is the policy-making and umbrella organization for the Chabad-Lubavitch Chasidic Jewish spiritual movement and organization founded in Russia in the Eighteenth Century Chabad submits this brief *amicus curiae*

[1] Pursuant to Supreme Court Rule 37.6, *Amicus* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *Amicus* or their counsel has made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this amicus brief.

because the issue presented for this Court's decision in this case may affect the *amicus*' ability to enforce a district court judgment that directed the Russian Federation and its instrumentalities ("Russia") to deliver to Chabad the 12,000 books and manuscripts seized by the Bolsheviks between 1917 and 1925 (the "library"), and 25,000 pages of documents and other materials compiled by Chabad's religious leaders seized by the Nazis and subsequently by the Soviet armed forces in Poland at the conclusion of World War II (the "archive").

After years of unsuccessful diplomatic negotiation with the Soviet Union and thereafter with the Russian Federation, Chabad filed a lawsuit on November 9, 2004, under the Foreign Sovereign Immunities Act (28 U.S.C. §§ 1602-1611) ("FSIA"), to recover the archive and library. Russia initially appeared in the lawsuit and objected to the district court's jurisdiction under the FSIA. The district court rejected Russia's position with respect to the archive but sustained it with respect to the library *Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F. Supp. 2d 6 (D.D.C. 2006) (Lamberth, J.). On Russia's appeal and Chabad's cross-appeal, the United States Court of Appeals for the District of Columbia Circuit held that there was potential jurisdiction under the FSIA over Chabad's claims to both the archive and the library. *Agudas Chasidei Chabad v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008).

Following remand of the case to the district court, Russia announced that it would no longer participate in the litigation. Chabad then presented evidence to the district court, and the district court entered a

default judgment in Chabad's favor. The district court ordered Russia to deliver the archive and library to Chabad or to the United States Embassy in Moscow.

Russia refused to comply. After unsuccessful extra-judicial efforts in which the Department of State participated, Chabad sought a civil contempt order. The district court found Russia to be in civil contempt and ordered a civil contempt remedy of $50,000 per day for continued refusal to comply with the district court's order. *Agudas Chasidei Chabad of United States v. Russian Federation*, 798 F. Supp. 2d 260, 264-65 (D.D.C. 2011).

On September 10, 2015, the district court entered an Order granting Plaintiff's Motion for an Interim Judgment of Accrued Sanctions against Russia in the amount of $47.3 million for its civil contempt. Chabad has been attempting to find assets that can be attached pursuant to 28 U.S.C. § 1610 in order to execute on that judgment. Efforts may be made to legislate an amendment to the FSIA that would facilitate such recovery.

INTRODUCTION

Petitioner Bank Markazi has presented a broad question to this Court: "Whether a statute that effectively directs a particular result in a single pending case violates the separation of powers." This *amicus curiae* submits that the Question Presented by Bank Markazi is too broadly framed. This case truly presents a much narrower issue that determines the proper result: "Whether Congress may enact a statute that, in specified litigation, modifies statutory limitations impeding execution of

a money judgment against the assets of a foreign sovereign." The Court need not reach the broad question that Bank Markazi has presented but should decide the case with an affirmative response to the more narrow issue and affirm the decision of the Court of Appeals for the Second Circuit.

Congress has not decided the merits of any litigation in the statute that Bank Markazi challenges. Congress has not directed by statute that a particular plaintiff prevails in a dispute with a particular defendant. All that Section 8772 does is to remove pre-existing statutory barriers that made it difficult – maybe impossible – to reach Bank Markazi's assets to pay judgments that the trial court had entered. The fact that the law applies only to a "single pending case" (if the joined claims of 19 separate actions for thousands of terrorism victims can be called a "single" case) does not, under this Court's decisions, diminish Congress' legislative authority to affect an ongoing lawsuit by modifying onerous statutory pre-conditions for execution of a money judgment that Congress and the New York Legislature had previously prescribed and that continue to apply to cases other than those specifically identified.

This *amicus* currently holds a civil contempt judgment of more than 47 million dollars against Russia because, after litigating and losing, Russia contemptuously refused to comply with a district court order. Finding Russian assets in the United States that satisfy the exacting standards of 28 U.S.C. § 1610 is not an easy task. If Congress were to determine that these imposing standards should be modified to facilitate collection of a judgment that

(a) vindicates the district court and the judicial process, and (b) demonstrates to a foreign sovereign subject to jurisdiction under the Foreign Sovereign Immunities Act that court orders may not be blithely ignored, it could enact legislation making Russian assets in the United States accessible to Chabad. Such a statute would "effectively direct a particular result in a single pending case," but it would easily pass muster under the test that this Court has imposed in prior decisions. This Court should affirm the decision below because the Court of Appeals for the Second Circuit correctly decided that Congress may constitutionally enact a law that would facilitate execution of a money judgment in a particular civil lawsuit against a foreign sovereign.

SUMMARY OF ARGUMENT

1. Affirmance of the Second Circuit's decision follows *a fortiori* from this Court's unanimous ruling in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992). Whereas the statute at issue in *Robertson* appeared to direct certain findings of fact in specifically designated cases, thereby replacing a court's fact-finding duty with Congress' edict, Section 8772 is not phrased in similar terms and does not substitute Congress' judgment for a judicial finding.

2. Section 8772 does not erase or alter in any way a final court judgment, as did the law invalidated in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). The challenged law in this case affects only the plaintiffs' ability to execute on judgments they have won.

3. If *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), still has current vitality, that decision does not invalidate a law that assists plaintiffs in enforcing court judgments rather than forecloses the rights of plaintiffs who, by governmental action, have been granted the right to recover their own captured or abandoned property.

4. This Court's opinion in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), confirms the power of Congress to engage in "nonpunitive legislative policymaking" that transfers ownership of private property from only one named person.

ARGUMENT

I.

AFFIRMANCE OF THE DECISION BELOW FOLLOWS *A FORTIORI* FROM THIS COURT'S UNANIMOUS DECISION IN *ROBERTSON v. SEATTLE AUDUBON SOCIETY*

Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), concerned a federal statute that declared "management of areas on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon is *adequate consideration for the purpose of meeting the statutory requirements* that are the basis for" two specified federal lawsuits, identified by the captions of the cases, including docket numbers. (Emphasis added.) This Court unanimously held that this statutory provision "compelled changes in law, not findings or results under old law." 503 U.S. at 438.

On its face, the challenged statute in *Robertson* expressed Congress' finding that, in the cited cases, courts must deem certain "management" activity to be "adequate consideration" to satisfy certain statutory prerequisites. Whether statutory criteria have been satisfied by the conduct of parties seeking benefits under a statute is ordinarily a factual issue that the judiciary, not the executive or the legislature, must resolve on the record of an individual case. On this account, the court of appeals held in *Robertson* that the challenged statute "directs the court to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court." *Seattle Audubon Society v. Robertson*, 914 F.2d 1311, 1316 (9th Cir. 1990).

This Court reversed the court of appeals' decision unanimously. This Court held that notwithstanding the language and tenor of the law, Congress was not ordering courts to make findings of fact on the record before them. Congress was, according to the unanimous decision of this Court, directing "a change in law, not specific results under old law." 503 U.S. at 439.

In this case Section 8772 does not, as the statute did in *Robertson*, fill an evidentiary void with a Congressional finding. Section 8772 is entirely forward-looking. It directs that assets defined in subsection (b) "shall be subject to execution or attachment in aid of execution in order to satisfy any judgment " Unlike the statute challenged in *Robertson*, Section 8772 does not purport to substitute a Congressional finding for a finding that must, in other comparable cases, be made by a court.

Consequently, Section 8772 is most assuredly a constitutionally permissible "change in law."

II.

PLAUT v. SPENDTHRIFT FARM, INC., IS INAPPOSITE BECAUSE SECTION 8772 DOES NOT ALTER FINAL COURT JUDGMENTS

In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), this Court held that Congress may not constitutionally direct the retroactive reopening of court judgments that had dismissed complaints barred by the statute of limitations. The Court's majority opinion noted that from the earliest days of the Republic the constitutional separation of legislative and judicial powers barred Congress from interfering with the final judgments of federal courts. "The power to annul a final judgment was 'an assumption of Judicial power,' and therefore forbidden." 514 U.S. at 224, quoting from *Bates v. Kimball*, 2 Chipman 77 (Vt. 1824).

This case does not concern a law that erases or modifies any final court judgment. Indeed, Section 8772 has the opposite effect; it furthers and facilitates court judgments that have granted damage awards to many victims of terrorism who, without Section 8772, could not secure their rights. Moreover, under the separation-of-powers standards applied by Justice Breyer in his concurring opinion in *Plaut* (514 U.S. at 240-246) and by Justices Stevens and Ginsburg in their dissent (514 U.S. at 246-266), Section 8772 passes constitutional muster.

III.

THIS CASE IS NOT AFFECTED BY *UNITED STATES v. KLEIN*

Bank Markazi contends that *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), created a constitutional rule that bars statutes that "direct the outcome of specific cases." Brief for Petitioner 43. On this basis it contends that Section 8772 exceeds Congress' designated authority. The precise rationale of *United States v. Klein* is murky, and the Court's opinion in *Klein* never explicitly articulates the unconditional prohibition against "dictating the outcome of a pending case" that Bank Markazi invokes.

In a decision rendered after its *Robertson* holding was reversed by this Court, the Court of Appeals for the Ninth Circuit observed that "*Klein* has remained an isolated Supreme Court application of the separation of powers doctrine to strike down a statute that dictated the result in pending litigation." *Alliance for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1173 (9th Cir. 2012). The Ninth Circuit – which had relied heavily on *Klein* in the *Robertson* holding that this Court unanimously reversed – held *Klein* inapplicable and applied in *Alliance for the Wild Rockies* a Congressional amendment that retroactively removed a distinct population of gray wolves in the northern Rocky Mountains from the protections of the Endangered Species Act.

Whatever may be the holding of *Klein* and its continuing validity today, that decision has no application to this case. Section 8772 facilitates

recovery of judgments that a district court has entered in favor of terrorism victims. The Congressional enactment that was struck down by this Court in *Klein* retroactively denied to pardoned Confederate sympathizers the right to reclaim their captured or abandoned property. If a Congressional law had hypothetically done the opposite of the objective that Section 8772 actually achieves – if Congress had, by legislative fiat, invalidated all judgments won in district courts by victims of terrorism against Iran – *United States v. Klein* might be cited as a parallel instance to void such a statute. In fact, however, the decision in *Klein* has no bearing on this case.

IV.

NIXON v. ADMINISTRATOR DEMONSTRATES THAT LEGISLATION MAY DIRECT THE DISPOSITION OF ONE PERSON'S PRIVATE PROPERTY

Nixon v. Administrator of General Services, 433 U.S. 425 (1977), concerned a statute that gave complete possession and control of the property of one person – a former President of the United States – to the Administrator of General Services. This Court considered and rejected various challenges to the Presidential Recordings and Materials Preservation Act, including the contention that the law amounted to a constitutionally prohibited Bill of Attainder.

The Court could have rejected the Bill of Attainder claim entirely on the ground that the taking of President Nixon's papers was not

"punishment." See 433 U.S. 469-477. The Court's decision was not so limited. The majority opinion went on to hold that even if the law was "an act of nonpunitive legislative policymaking" applicable to only one individual, it was constitutionally permissible legislation. 433 U.S. at 477-482.

By the same token, Bank Markazi has no constitutional separation-of-powers claim based on the fact that Section 8772 applies only to its assets. Congress may enact laws that transfer possession and control of one person's private property.

CONCLUSION

For the foregoing reasons and those presented by the respondents, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

December 22, 2015

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